

November 13, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Eugenie Reich

Date of Filing: July 11, 2007

Case Number: TFA-0213

On July 11, 2007, Eugenie Reich (Reich) filed an Appeal from a determination issued to her on June 6, 2007, by the FOIA and Privacy Act Group of the Department of Energy (DOE/HQ) in response to a request for documents that Reich submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/HQ release responsive material.

I. Background

In December 2006, Reich filed a FOIA request with DOE/HQ for (1) any records that identify the members of a panel convened by James Roberto of the Oak Ridge National Laboratory (ORNL) to investigate fraud and research misconduct allegations made through the journal *Nature* against researchers in the Stephen Pennycook research group of ORNL during the summer of 2006, and (2) the final investigation report from the panel. Electronic mail message from Reich to OHA, December 9, 2006.¹ DOE/HQ informed Reich that the DOE Office of Science (DOE/OS) determined that the records in question are records owned by a contractor, in this case the management and operating contractor of Oak Ridge, UT-Battelle. Letter from DOE/HQ to Reich, June 6, 2007 (Determination Letter). According to DOE/HQ, the contract between DOE and UT-Battelle has designated all records that concern employee-related investigations as the property of the contractor and not subject to the provisions of the FOIA. DOE/HQ went on to state that the creator of the record, UT-Battelle, provided the document to the Office of Science “in accordance with the contract in which [UT-Battelle] retained control of the document.” Determination Letter at 1. Reich appealed the determination and asked OHA to order DOE/HQ to release the responsive documents. Letter from Reich to OHA (July 11, 2007) (Appeal).²

¹ These are the same documents that were the subject of the request that led to an appeal in OHA Case No. TFA-0187, *Eugenie Reich*, 29 DOE ¶ 80,289 (2007).

² Reich informed this office that she would supplement her Appeal at a later date, and OHA received the additional material, dated October 10, 2007, on October 16, 2007. In the supplemental submission, the appellant raises a number of issues concerning both the matters under consideration in this proceeding and those examined in Case No. TFA-0187, a decision regarding an earlier appeal she filed. In that earlier proceeding, Reich appealed a denial of her request for expedited processing of her request for the information under consideration here. Among her arguments with respect to Case No. TFA-0187, the appellant asserts that OHA failed to consider the justifications for expedited processing she

II. Analysis

DOE/OS argues that the final report of the ORNL investigation is a contractor-owned record and not subject to FOIA. DOE/OS bases its argument on the following clause from the contract between UT-Battelle and DOE:

(b) Contractor-owned records. The following records are considered the property of the Contractor and are not within the scope of paragraph (a) of this clause.

(1) Employment-related records (such as worker's compensation files; employee relations records, records of salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns, and other *employee-related investigations conducted under an expectation of confidentiality* ;

...

Contract DE-AC05-00OR22725, Clause I-141. 970.5204-79 Access to and Ownership of Records. (emphasis added).

The report of investigation, an employee-related investigation conducted under an expectation of confidentiality, was not considered an agency record under the UT-Battelle contract. Reich argues that notwithstanding the contract clause cited above, the report is an agency record because it was provided to the agency and then used by DOE to fulfill its responsibilities under the research misconduct policy.

A. Whether the Report is an Agency Record

Our threshold inquiry in this case is whether the documents in question are agency records and thus subject to the FOIA under the criteria set out by the federal courts. The statutory language of the FOIA does not define an agency record, but merely lists examples of the types of information that agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the court for determining whether documents created by non-federal organizations such as UT-Battelle are subject to the FOIA. *See, e.g. Dallas Register*, 28 DOE ¶ 80,207 (March 1, 2002) (Case No. VFA-0711); *Dr. Nicolas Dominguez*, 27 DOE ¶ 80,117 (March 10, 1998) (Case Nos. VFA-0377, VFA-0378, VFA-0379).³ That analysis involves a

provided and reworded them in such a manner that their import was diminished. I have considered those contentions as well as the others she raised regarding that decision, and find that none of them dictates that modification of the decision in Case No. TFA-0187 is necessary. Regarding the current proceeding, the appellant requests that, if OHA overturns the initial determination, her request for expedited processing now be granted or her right to judicial review be reaffirmed. Because I have determined that the decision in Case No. TFA-0187 should stand, the appellant may seek judicial review as set forth in the ordering paragraphs of that decision.

³ All OHA decisions issued after November 19, 1996 may be accessed at <http://www.oha.doe.gov/foia1.asp>.

determination of (1) whether the organization is an “agency” for purposes of the FOIA and, if not, (2) whether the requested material is nonetheless an “agency record.” *See Dallas Register*, 28 DOE ¶ 80,207 (March 1, 2002) (Case No. VFA-0711). A private organization must be considered a federal agency if its daily operations are supervised by the federal government. *Forsham v. Harris*, 445 U.S. 169, 180 (1980). DOE does not supervise the daily operations of UT-Battelle, and we therefore conclude that UT-Battelle is not an agency subject to the FOIA. Nonetheless, after completing the second step of the analysis, we find that the report of investigation is an agency record and thus subject to the FOIA.

In *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989), the Court stated that documents are “agency records” for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. *See also Qwest/GSD*, 28 DOE ¶ 80,224 (May 8, 2002) (Case No. VFA-0739). The report of investigation meets the first test because, according to the Determination Letter and our conversation with DOE/OS, UT-Battelle provided a copy of the report to DOE/OS. Determination Letter at 1. As explained below, we also find that the report was under agency control at the time of Reich’s request.

B. Whether the Report was Within DOE Control at the Time of the Request

Courts have identified four relevant factors for an agency to consider when determining whether the agency has control over a document: (1) the intent of the record’s creator to retain or relinquish control over the record; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the record; and (4) the extent to which the record was integrated into the agency’s recordkeeping system or files. *Consumer Federation of America v. USDA*, 455 F.3d 283, 288 n.7 (D.C. Cir. 2006). We contacted DOE/HQ for further information regarding its determination, and that office directed us to the Office of General Counsel (DOE/OGC). DOE/OGC concluded that three of the four factors in the *Consumer Federation* test weighed against a finding of agency control over the report of investigation. Electronic mail message from Jocelyn Richards, DOE Office of General Counsel, to Valerie Vance Adeyeye, OHA (September 5, 2007). According to DOE/OGC, UT-Battelle created and intended to retain control over the responsive document, as indicated in the contract between DOE and the contractor. DOE/OGC also stated that DOE/OS contends that it was not able to use or dispose of the record at will, and that the record was not integrated into DOE recordkeeping systems or files. *Id.*

Reich argues that the report was under agency control because DOE/OS required the report in order to establish UT-Battelle’s compliance with the federal agency research misconduct policy. She states that “[t]hese policies require that Dr. Dehmer or the responsible DOE official receive the investigation report, and that she or DOE provide oversight of the misconduct investigation as part of fulfilling a responsibility to provide oversight of federally funded research.” Appeal at 3.

We contacted the Office of Science to determine the extent to which that office read or relied on the investigative report, the third factor in the *Consumer Federation* analysis. DOE/OS contends that they had access to the report “only to provide oversight on the investigation.” Electronic Mail

Message from Veronica Angulo, DOE/OS to Valerie Vance Adeyeye (September 10, 2007). According to DOE/OS, ORNL followed the steps outlined in the research misconduct procedure: inquiry, investigation and finally adjudication. Memorandum of Telephone Conversation between Helen Kerch, Harriet Kung and Veronica Angulo, DOE/OS, and Valerie Vance Adeyeye, OHA (October 12, 2007). ORNL informed DOE when the inquiry became an investigation. In order to begin the investigation, ORNL established a panel of scientists, none of whom are employed by ORNL. The panel made a finding of “no misconduct.” At the conclusion of the investigation, ORNL did show DOE/OS copies of the report, all contained in binders marked “Do Not Duplicate.” *Id.* The research institution met with DOE and presented those copies in order to show DOE/OS that it had conducted a sound investigation, following the procedure outlined in the research misconduct policy. This meeting allowed DOE/OS to review the process that the panel used to arrive at its findings.⁴ It was very important to DOE/OS to confirm, as it did, that the panel was objective and composed of experts who did not work at ORNL. At the conclusion of the review, ORNL then took all of the copies back. *Id.* However, someone at ORNL sent a copy of the report via electronic mail to Dr. Patricia Dehmer of DOE/OS. *Id.* There is no indication that DOE used this report for any other purpose.

DOE/OS alleges that the report was not used for any purpose other than to confirm the procedural accuracy of the investigation and to present the conclusion of the panel. Nonetheless, we find that the report of investigation is an agency record because it was obtained by DOE and was under the control of DOE at the time of the request. *Tax Analysts*, 492 U.S. at 144-145. As directed by *Consumer Federation*, we considered the four relevant factors that determine if an agency has control over a document. First, we find that UT-Battelle, through its ownership of records clause, clearly intended to retain control over the report of investigation. As regards the second factor, UT-Battelle stamped copies of the report with “Do Not Duplicate” and retrieved those copies immediately after the meeting between DOE/OS and ORNL, thereby restricting the ability of the agency to use and dispose of the report as it sees fit. The front page of the emailed copy of the report also contains a statement that the document is not to be copied or disclosed without written authorization from UT-Battelle. However, in considering the third factor, we conclude that DOE personnel relied upon the report to determine that the investigation was conducted appropriately. With respect to the fourth factor, DOE/OS stated that a copy had been provided to its office via electronic mail and that copy has been retained in the office archives. Thus, an analysis of the four factors supports a decision that the report of investigation is an agency record.

Moreover, according to *Tax Analysts*, a record is within the control of an agency when “the materials have come into the agency’s possession in the legitimate conduct of its official duties.” *Tax Analysts*, 492 U.S. at 146. The use of the record described above meets the *Tax Analysts* requirement for agency control of the record because the report was obtained by DOE and was an element of DOE’s official oversight of the investigation. Therefore, for the reasons set forth above, we find that the report of investigation is an agency record and subject to release under the FOIA.⁵

⁴ The panel did not participate in the adjudication.

⁵ DOE/OS has not stated that it ever obtained any other record that identifies the members of the investigation panel, the second record requested by Reich. DOE/OS did not have such a record in its possession and control at the time of the

Accordingly, this Appeal is granted. The Office of Science shall either release the report of investigation or issue a new determination to justify its withholding of any portion of the report.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Eugenie Reich on July 11, 2007, OHA Case Number TFA-0213, is hereby granted.

(2) The Office of Science shall either release the final report of investigation of the panel convened by James Roberto of ORNL to investigate fraud and research misconduct allegations made through the journal *Nature* against researchers in the Stephen Pennycook research group of ORNL during the summer of 2006 or issue a new determination to justify its withholding of any portion of the report.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
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Office of Hearings and Appeals

Date: November 13, 2007